No. 89-1647

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

CARNIVAL CRUISE LINES, INC.,
*Petitioner,*
v.
EULALA SHUTE AND RUSSEL SHUTE,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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## MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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The Chamber of Commerce of the United States, pursuant to Supreme Court Rule 37.2, respectfully requests leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case. This motion is necessary because respondents, Eulala and Russel Shute, refused to consent to the filing of this brief. Petitioner, Carnival Cruise Lines, Inc. ("Carnival"), has consented.[1]

This case arises from a Washington district court's exercise of *in personam* jurisdiction over Carnival. The case involves the Shutes' Washington purchase of cruise

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[1] A copy of petitioner's consent letter is being filed simultaneously with this motion.

tickets from Carnival and the subsequent injuries the Shutes allegedly sustained in international waters during that cruise.

The issue presented concerns the required relationship between a cause of action and a nonresident defendant's contacts with the forum necessary to support an exercise of specific *in personam* jurisdiction consistent with the due process clause of the fourteenth amendment. The Ninth Circuit's holding that due process is satisfied when the defendant's forum contacts are a "but for" cause of the litigation will have substantial detrimental impact upon the business community—particularly small businesses that do not operate in national markets.

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, representing more than 180,000 companies as well as several thousand trade and professional associations and state and local chambers of commerce. Ninety-three percent of the Chamber's members are businesses with fewer than 100 employees, and seventy percent have fewer than twenty employees. The Chamber also sponsors The Counsel of Small Business which seeks to promote the needs of small businesses. The Chamber regularly presents its views before this Court and the lower federal courts.[2]

The Chamber has surveyed many of its small business members in the manufacturing, wholesale, retail, and service industries and determined that, particularly as applied to small businesses, the Ninth Circuit's ruling fails to account for the realities of the contemporary marketplace and will place prohibitive costs upon small businesses and the persons they employ. For these reasons, and as further set forth in the attached brief, the Chamber believes that the Ninth Circuit's ruling "offend[s] 'traditional notions of fairness and substantial justice,'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted), implicated by due process.

As the principal voice of the American business community, the Chamber is well-suited to represent the interests of small businesses in this case. Because the Chamber believes it is important for this Court to recognize the significance of this issue to the business community, the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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[2] *See, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69 (Tex. 1989), *cert. granted*, 110 S. Ct. 1804 (1990); *FMC Corp. v. Holliday*, 885 F.2d 79 (3d Cir. 1989), *cert. granted*, 110 S. Ct. 1109 (1990); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Tull v. United States*, 481 U.S. 412 (1987).

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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### STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to the preceding Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

### STATEMENT OF THE CASE

This case arises from a Washington district court's exercise of *in personam* jurisdiction over petitioner, Carnival Cruise Lines, Inc. ("Carnival"), a Panamanian cruise line with its principal place of business in Miami, Florida. The case involves the Washington purchase of cruise tickets by respondents, Eulala and Russel Shute,

from Carnival and the subsequent injuries the Shutes allegedly sustained in international waters during that cruise.

Carnival's ships do not make ports of call in Washington. Carnival's only contacts with Washington consist of placing advertisements for its cruises in newspapers, presenting seminars for travel agencies (including distributing brochures), and paying travel agencies a ten percent commission for tickets they sell. Carnival is not registered to do business in Washington, has never paid business taxes in the state, and does not maintain an office or bank account there.

After purchasing tickets from a Washington travel agency, the Shutes embarked from Los Angeles, California, upon Carnival's ship the M/V TROPICAL. While in international waters off the coast of Mexico, Eulala Shute was injured when she allegedly slipped on a deck mat.

The Shutes subsequently filed suit against the Miami-based Carnival in the United States District Court for the Western District of Washington, where the court dismissed the action for lack of *in personam* jurisdiction. *Shute v. Carnival Cruise Lines*, No. C86-1204D (W.D. Wash. June 25, 1987). On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding, *inter alia*, that an exercise of jurisdiction was consistent with the due process clause of the fourteenth amendment. *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990).

## SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Contrary to the mandates of the due process clause of the fourteenth amendment, the Ninth Circuit's ruling vitiates the distinction between general and specific *in personam* jurisdiction. The Ninth Circuit's ruling further violates the due process standard of fair play and substantial justice by rendering determination of specific *in personam* jurisdiction unpredictable, in that, particularly as applied to small businesses, the ruling permits an exercise of jurisdiction far beyond that which ordinary commercial experience supports. Moreover, if permitted to stand, the Ninth Circuit's ruling would have substantial detrimental impact upon small businesses, in contravention of long-standing national policy.



## ARGUMENT

### I. THE NINTH CIRCUIT'S RULING VITIATES THE DISTINCTION BETWEEN GENERAL AND SPECIFIC *IN PERSONAM* JURISDICTION

The due process clause of the fourteenth amendment permits a court acting pursuant to a state long-arm statute to exercise either general or specific *in personam* jurisdiction over a nonresident defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984). A court may exercise general jurisdiction over a defendant for any cause of action if the defendant has a "continuous and systematic" presence in the forum. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952). Where, as here, a defendant does not have a "continuous and systematic" presence in the forum, a court may exercise specific jurisdiction over the defendant where "the defendant [1] has 'purposefully directed' his activities at residents of the forum . . . and [2] the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984), and *Helicopteros Nacionales*, 466 U.S. at 414).

The Ninth Circuit held below that, for the purpose of satisfying the second prong of the specific jurisdiction

standard, a cause of action arises out of[1] activities in the forum where those activities are a "but for" cause of the injuries that are the subject of the litigation. *Shute*, 897 F.2d at 383-86. Contrary to the due process clause of the fourteenth amendment, however, the Ninth Circuit's "but for" test vitiates the distinction between general and specific jurisdiction.[2]

The Ninth Circuit's "but for" test, as illustrated more fully in part II, *infra*, permits a plaintiff to maintain a cause of action that bears no relationship, based upon reason or common experience, to a defendant's activities in the forum. Indeed, as one commentator noted, " 'the [but for] causes of an event go back to the discovery of America and beyond.' " Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 92 (quoting W. Prosser & P. Keeton, The Law of Torts 567 (4th ed. 1971)). Accordingly, in the absence of any real nexus between a defendant's forum contacts and the cause of action, the Ninth Circuit's test, in effect, renders a defendant sub-

[1] Because the Washington long-arm statute extends to the full extent permitted by due process, *Shute v. Carnival Cruise Lines*, 113 Wash. 2d 763, 783 P.2d 78 (1989), the Ninth Circuit apparently construed the words "arising out of" in the statute to be synonymous with the "arising out of or relating to" standard enunciated by this Court, *Shute*, 897 F.2d at 383-86, although the words "relating to" do not, in fact, appear in the statute. Wash. Rev. Code Ann. § 4.28.185 (1988).

Moreover, in a comment that portends this case, the Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, expressly reserved the issue of whether the terms "arising out of" or "related to" describe a different relationship to a cause of action. 446 U.S. at 415-16 n.10. The Court further stated: "Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action 'relates to,' but does not 'arise out of,' the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction." *Id. But see id.* at 424-28 (Brennan, J., dissenting).

[2] *Cf. Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986).



ject to an exercise of general jurisdiction for essentially any cause of action based only upon the showing of "purposefully directed" activities toward the forum required by the first prong of the specific jurisdiction standard. Through obviating the general jurisdiction requirement for a "continuous and systematic" presence in the forum, the Ninth Circuit's "but for" test vitiates the constitutionally-mandated distinction between specific and general jurisdiction.

Apart from the mandates of due process, the Ninth Circuit's "but for" test is logically inconsistent with the two-prong specific jurisdiction standard. Under the specific jurisdiction standard, it is axiomatic that a cause of action may arise out of or relate to *only* jurisdictional contacts with the forum sufficient to support a finding of "purposefully directed" activities. The Ninth Circuit's "but for" test, however, violates this axiom by holding that a cause of action may arise out of or relate to jurisdictional contacts with the forum *insufficient* to support a finding of "purposefully directed" activities.

Thus, in illustration, in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), this Court held that a defendant's placing an article into the stream of commerce, without more, did not constitute sufficient jurisdictional contacts with the forum to support a finding of "purposefully directed" activities in a personal injury action involving that article. *Id.* at 112. Notwithstanding the lack of sufficient jurisdictional contacts with the forum in *Asahi*, placing the article into the stream of commerce was nonetheless a "but for" cause of the accident. Accordingly, applying the Ninth Circuit's "but for" test would hold, contrary to the requirements of the specific jurisdiction standard, that the cause of action arose out of or related to jurisdictional contacts *insufficient* to support a finding of "purposefully directed" activities.[3]

[3] Similarly, *Hanson v. Denckla*, 357 U.S. 235 (1958), involved an heir's challenge to a nonresident trustee's administration of a trust

## II. THE NINTH CIRCUIT'S RULING VIOLATES THE DUE PROCESS STANDARD OF FAIR PLAY AND SUBSTANTIAL JUSTICE INASMUCH AS IT RENDERS DETERMINATION OF JURISDICTION UNPREDICTABLE

The "constitutional touchstone," *Burger King*, 471 U.S. at 474, of the due process limitation on *in personam* jurisdiction is whether an exercise of jurisdiction "offend[s] 'traditional notions of fair play and substantial justice.'" *Asahi*, 480 U.S. at 113 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).[4] Accordingly, this Court has held that accepted notions of fairness and justice require that application of state long-arm statutes provide " 'a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where . . . conduct will and will not render them liable to suit.'" *Burger King*,

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in the manner directed by the settlor. *Id.* at 238-41. The Court held that the presence in the forum of the settlor and her correspondence with a nonresident trustee directing administration of the trust provided insufficient contacts with the forum to establish jurisdiction over the trustee. *Id.* at 253-54. Once again, notwithstanding the lack of sufficient jurisdictional contacts with the forum in *Hanson*, the trustee's actions nonetheless were the "but for" cause of the litigation, because, in the absence of the trustee's corresponding with the settlor, the settlor's challenged instructions would not have been received and implemented. Thus, applying the Ninth Circuit's test to *Hanson* would hold, again contrary to the specific jurisdiction standard, that the cause of action arose out of or related to the trustee's jurisdictionally insufficient forum activities.

[4] The due process clause, through protecting an individual's liberty interest, also "operates to restrict state power." *Burger King*, 471 U.S. at 472 n.13. This restriction prevents a state, through its long-arm statute, from unreasonably asserting its sovereignty and, thereby, rendering "binding judgments" over another state's residents. *Id.* at 471-72. Here, the Ninth Circuit's ruling, through permitting jurisdiction to be supported by such an attenuated relationship between the cause of action and a defendant's forum contacts, disregards this important constitutional limitation on state power.



471 U.S. at 472 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The Ninth Circuit's "but for" test does not comport with the due process mandate of predictability required by accepted notions of fairness and justice. The Ninth Circuit's "but for" test permits a plaintiff to maintain a cause of action so attenuated from the defendant's actions in the forum as to exceed any reasonable "jurisdictional risk" [5] the potential defendant assumed based upon its limited contacts with the forum. The "but for" test thus permits an exercise of jurisdiction in circumstances that go far beyond the expectations that the ordinary commercial experience of potential defendants supports.

This lack of predictability, the Chamber's inquiry among its members revealed, bears particularly hard on small businesses—which do not operate in national markets and are left without any accessible standard upon which to "structure their primary conduct," *Burger King*, 471 U.S. at 472, and upon which to predict where they may be subject to suit.[6] A few simple examples, typical

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[5] *See* Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 649 (1988).

[6] The burden upon small businesses caused by the lack of predictability inherent in the Ninth Circuit's "but for" test is compounded by the absence of clear and uniform guidance regarding the constitutional showing required to satisfy the second prong of the specific jurisdiction standard. Thus, as the Ninth Circuit noted, *Shute*, 897 F.2d at 383-85, some courts construing state long-arm statutes (but not the fourteenth amendment) have applied an "arising from" test in exercising specific jurisdiction, *Marino v. Hyatt Corp.*, 793 F.2d at 430; *Pearrow v. National Life & Accident Insurance Co.*, 703 F.2d 1067, 1069 (8th Cir. 1983), while other courts construing the fourteenth amendment appear to have applied a "but for" test. *Lanier v. American Board of Endodontics*, 843 F.2d 901 (6th Cir. 1988); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981). Still other courts have adopted somewhat different approaches. *City of Virginia Beach v. Roanoke River Basin Association*, 776 F.2d 484, 487 (4th Cir. 1985) ("coincides with" test); *Southwire Co. v. Trans-World Metals & Co.*, 735 F.2d 440, 442 (11th Cir. 1984) ("connected with" test).

of the Chamber's many small business members, aptly illustrate their plight under the Ninth Circuit's "but for" test.[7]

The Ninth Circuit's "but for" test would permit an Oregon district court to exercise jurisdiction over a small Washington manufacturer whose only contact with Oregon was that it shipped its products through the state by truck for sale in California, where they injured a visiting Oregon plaintiff. Under the Ninth Circuit's test, the suit would satisfy the second prong of the specific jurisdiction standard, inasmuch as, in the absence of the manufacturer's transporting its products through Oregon, the injuries would not have occurred.[8]

Similarly, a small Alaskan charter airline could be subject to suit in California where a California plaintiff was injured on one of the airline's flights, despite that the airline's only contact with California was its advertisement in a national fishing magazine read by plaintiff. Under the Ninth Circuit's "but for" test, the suit again would satisfy the second prong of the specific jurisdiction standard, inasmuch as the airline's solicitation in California was a "but for" cause of the claimed injuries.

Finally, a small Ohio wholesaler of specialty machine parts could be subject to a tortious breach of contract suit in California despite that its only contact with California was that, pursuant to a contract with an Ohio manufacturer, it delivered machine parts to the manufacturer's subcontractor in California. Under the Ninth Circuit's

[7] In contrast, most large national businesses are subject to suit in essentially all states.

[8] In this example, the manufacturer's transporting its products through Oregon is not, strictly speaking, a "but for" cause of the Oregon resident's injuries—that is, the products could have arrived through another route. However, the example satisfies the "but for" test as applied by the Ninth Circuit, which held that Carnival's solicitation in Washington was a "but for" cause of the Shutes' injuries, despite that nothing in logic or physical science requires such solicitation as a prerequisite to the Shute's injuries. *Shute*, 897 F.2d at 383-86.



"but for" test, this suit as well would satisfy the second prong of the specific jurisdiction standard, because, but for the delivery of the machine parts, the litigation would not have arisen.[9]

In the above examples, permitting a court to exercise specific jurisdiction over the defendant simply does not comport with the level of jurisdictional predicability mandated by " 'traditional notions of fair play and substantial justice.' " *Asahi*, 480 U.S. at 113 (citations omitted). In each example, the defendant is held subject to suit in the plaintiff's chosen forum without any basis from reasonable commercial experience upon which to predict that it could be subject to suit there.[10] Moreover, the plaintiff, thereby, is absolved of any jurisdictional risk: while maintaining his choice of forum, the plaintiff may, with impunity, choose to do business with a nonresident defendant without inquiring whether the defendant maintains any genuinely-related forum contacts.

## III. THE NINTH CIRCUIT'S RULING, IF PERMITTED TO STAND, WILL HAVE SUBSTANTIAL DETRIMENTAL IMPACT UPON SMALL BUSINESSES IN CONTRAVENTION OF LONG-STANDING PUBLIC POLICY

A guiding force in this Court's enunciation of the modern law of *in personam* jurisdiction has been the need to adapt the law to the contemporary marketplace. *World-Wide Volkswagen*, 444 U.S. at 293-94; *Hanson*, 357 U.S. at 250-51. The Ninth Circuit's ruling, however, fails to

[9] This example further illustrates the absurd results the Ninth Circuit's "but for" test could compel, inasmuch as, under the test, the Ohio wholesaler could be subject to suit in any of the states through which its machine parts traveled en route to California.

[10] The Ninth Circuit's application of a "reasonableness" test to exercise of *in personam* jurisdiction, *Shute*, 897 F.2d at 386, does not effectively ameliorate the unfairness and injustice of the above examples, because, under the Ninth Circuit's test, a rebuttable presumption of "reasonableness" arises when "purposeful availment" of the forum's laws is established. *Id.*

account for the realities of the contemporary marketplace and will have substantial detrimental impact upon small businesses and the persons they employ.

Under the Ninth Circuit's ruling, a small business that has no reasonable basis upon which to gauge its jurisdictional risk must therefore protect against all conceivable risks. The Chamber's inquiry among its small business members revealed that the cost of protecting against these risks will be prohibitive for many small businesses.

The costs the Ninth Circuit's ruling imposes upon small businesses include substantially increased insurance costs to protect against suits in foreign jurisdictions arising from foreign law. Thus, if the Ninth Circuit's ruling is followed in other circuits, small businesses may be the next casualties of the national insurance crisis. More importantly, small businesses will have to bear the direct costs—which for them will be exorbitant—of implementing compliance with unique and unfamiliar laws in foreign jurisdictions with which they have only the most minimal of contacts.[11]

Additionally, the Ninth Circuit's ruling requires small businesses to bear alone the substantial cost of defending a suit in a distant forum. Such a result is both inequitable and economically inefficient in that it is the tort plaintiff who is best able to bear the cost of suing in a distant forum because the plaintiff more likely will be able to retain legal services on a contingency basis there.

Finally, the detrimental impact of the Ninth Circuit's ruling on small businesses contravenes long-standing national policy to "protect, insofar as is possible, the interests of small-business concerns in order to preserve free

[11] Although applicable choice of law provisions could reduce this cost, a small business nonetheless must protect against possible application of a foreign forum's law because choice of law provisions generally favor the forum state's law. Twitchell, *supra* note 4, at 664 (citing Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. Davis L. Rev. 869, 871 & nn.14-15 (1981).



competitive enterprise." 15 U.S.C. § 631(a) (1988). It is small businesses that are the source of economic innovation and renewal which is the life-blood of the American economy. Indeed, according to the Chamber's statistics, the United States has nineteen million small businesses that employ six out of every ten workers, create sixty-four percent of new jobs, and provide two out of every three workers their first job. Small businesses similarly account for twenty-one percent of the total United States manufacturing output, and account for more than twelve percent of the value of United States goods exported directly by manufacturers. The Ninth Circuit's ruling poses a definite and serious threat to the continued health of this national resource.

## CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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